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IN THE

Supreme Court of the United States

51 October Term [redacted] No. ~~716~~ 43

PETER HARISIADES,

Petitioner,

against

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI, BRIEF AND APPENDIX IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

October Term—1950

PETER HARISIADES,

Petitioner,

against

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York,

Respondent.

To the Supreme Court of the United States:

Your petitioner, Peter Harisiades, respectfully alleges:

A.

Summary Statement of Matter Involved

Petitioner came to this country legally from Greece in 1916, when he was 13 years of age.

In 1946, while his petition for naturalization was pending, petitioner was arrested for deportation upon a warrant of arrest charging present membership and affiliation in an organization believing in and advocating the overthrow of government by force and violence. This warrant had issued in 1930, *i.e.*, sixteen years earlier.

Hearings were conducted on October 15, 1946 and January 30-1, 1947, as a result of which the original charge was

found not to have been sustained but new charges were lodged and sustained, and the immigration inspector, who acted as judge and prosecutor (presiding inspector and examining inspector) recommended deportation because of (1) *past* belief in the overthrow of this Government by force and violence, (2) *past* membership in an organization believing in and advocating such doctrine, (3) *past* affiliation with such organization.

After these recommendations reached the Central Office of the Immigration and Naturalization Service the hearings were ordered reopened for the purpose of authenticating documents and lodging additional charges of the same general character. At the reopened hearings in February and March 1948 different individuals acted as hearing and examining officers, although the same individual who had theretofore acted in the dual capacity of hearing officer and examining officer continued as hearing officer. He proposed that all of the charges be sustained and the Commissioner sustained that view. Thereafter the Board of Immigration Appeals ordered petitioner's deportation on two grounds alone. It struck out the following three grounds: (1) Past belief in proscribed doctrines; (2) past affiliation in an organization having such proscribed doctrines; (3) past affiliation with an organization distributing proscribed literature. Deportation was sustained for *past membership* in (2) and (3).

Petitioner was admittedly a member of the Communist Party from 1925 to 1939. He has not been a member since then and had ceased to be a member before the deportation law was amended so as to render an alien deportable for past membership in an organization believing in and advocating the overthrow of the Government by force and violence or distributing literature containing such belief or advocacy. Documents were introduced and witnesses

testified in support of the Government's view that the Communist Party was of this proscribed nature.

After petitioner's arrest on the warrant of deportation he sued out a writ of habeas corpus. This was dismissed and an order to that effect entered February 20, 1950. On the same day this Court handed down its decision in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, as a result of which petitioner moved to amend his petition to set forth that the proceedings against him were not conducted in accordance with the Administrative Procedure Act (5 U. S. C. §1001 *et seq.*). The district court denied the motion on the merits, holding the Administrative Procedure Act not applicable to these proceedings.

The appeals from the dismissal of the writ and from the denial of the motion were consolidated and this consolidated appeal was decided by the Court of Appeals for the Second Circuit on February 6, 1951. The dismissal of the writ was reversed solely because under the Internal Security Act of 1950 (P. L. 831, 81st Cong. 2d Sess.) there was some question of petitioner's being subjected to physical persecution if deported to Greece. The order denying the motion for leave to amend the petition was sustained and the order of deportation upheld on the merits.

B.

Jurisdiction

The reversal of the order dismissing the writ was based on the provision of the Internal Security Act of 1950 (8 U. S. C. §156[a]) that "No alien shall be deported under any provisions of this chapter to any country in which the Attorney General shall find such alien would be subjected to physical persecution." This Court's jurisdiction rests on 28 U. S. C. §1254.

C.

Questions Presented

1. The first question presented is:

Whether the Act of October 16, 1918, as amended June 5, 1920, and more particularly as amended June 28, 1940, could, consistent with the Federal Constitution and particularly with the Bill of Rights thereof, be construed and applied so as to render petitioner deportable for past membership in an organization in which he had ceased to be a member months before the statute had been amended to render past members deportable:

(a) Whether the statute as so construed and applied offends the Bill of Rights;

(b) Whether the statute as so construed and applied bears any reasonable relation to the purpose for which Governmental power to deport exists;

(c) Whether the statute as so construed and applied denied petitioner due process of law because it subjected him to punishment under a law having an ex post facto and retrospective effect.

2. The second question presented is whether the petitioner was accorded due process and more particularly:

(a) Whether, consistent with due process, a single inspector could conduct the deportation hearings or any part of them against petitioner, thus combining the functions of judge and prosecutor;

(b) Whether, in view of the fact that the Administrative Procedure Act became law June 11, 1946 and Section 5 thereof providing for the separation of functions between the hearing examiner and the examining officer went into effect three months later,

and Section 11, providing for the appointment of hearing examiners from the Civil Service went into effect a year later, Section 5 of the Act was applicable to the proceeding against petitioner in which the warrant of arrest issued in 1930, was served on petitioner May 2, 1946, and its charge of present membership in an organization advocating overthrow of the Government by force and violence was found not to have been sustained but at the first hearing, i.e., on October 15, 1946, new charges of past membership in such an organization and past proscribed belief were lodged. There is inseparable from the foregoing the allied question of whether Section 11 of the Administrative Procedure Act applied to and was violated by reopened hearings conducted in February and March 1948, at which the same inspector, Gilbert Zimmerman, no longer acted in a dual capacity but remained as the presiding inspector and another individual functioned as examining inspector;

(c) Whether, if this Court finds the Administrative Procedure Act was applicable to deportation proceedings against the petitioner and was not complied with, the enactment of the Emergency Appropriations Act of 1950, which became effective September 26, 1950, purporting to authorize the conduct of deportation proceedings without regard to the provisions of Sections 5, 7 and 8* of the Administrative Procedure Act, could render the conduct of such prior deportation hearings against

---

* Section 11 providing for appointment of examiners subject to Civil Service and other laws not inconsistent with the Act fell when Sections 7 and 8 became inoperative because so many Section 11 examiners were to be appointed "as may be necessary for proceedings pursuant to Sections 7 and 8" (Sec. 11, A. P. A., 5 U. S. C. §1010).

the petitioner in violation of those provisions while they were applicable, sufficiently adequate and fair so that they did not constitute a denial of due process of law, or in any event make the question of the denial of such due process moot because any rehearing conducted at this time would be conducted without regard to the requirements of those sections of the Administrative Procedure Act, non-compliance with which is basic to the contention that petitioner was denied due process of law.

D.

Statutes Involved

Deportation

The Act of October 16, 1918, as amended by the Act of June 5, 1920, 8 U. S. C. §137, insofar as its provisions were involved in the deportation proceedings against petitioner provided:

"§137. **Other aliens excluded.** In addition to the aliens who are by law otherwise excluded from admission into the United States, the following persons shall also be excluded from admission into the United States:

* * *

"(c) **Aliens believing in, advising, etc., overthrow by force or violence of United States Government, or all forms of law, unlawful assaulting or killing of any Government officers, unlawful damage, etc., to property, or sabotage.** Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or

violence of the Government of the United States or of all forms of law, or (2) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States, or of any other organized government, because of his or their official character, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage—

"(d) **Aliens writing, publishing, etc., written or printed matter, advising, etc., opposition to organized forms of government, overthrow by force or violence of United States Government or all forms of law, unlawful assaulting or killing of Government officers, unlawful damage, etc., to property, or sabotage.** Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising, advocating, or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage—

"(e) **Aliens members of or affiliated with organization, etc., writing, etc., written or printed matter described in preceding paragraph.** Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publica-

tion, issue, or display, any written or printed matter of the character described in paragraph (d).

* * *

"(g) **Deportation.** Any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in this section shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in this subchapter. The provisions of this section shall be applicable to the classes of aliens mentioned therein irrespective of the time of their entry into the United States."

Insofar as involved in this proceeding, the above Act was amended by the Act of June 28, 1940 so as to provide:

"Any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:

* * *

"(g) **Deportation.** Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in this section, shall, upon the warrant of the Attorney General, be taken into custody and deported * * *." (8 U. S. C. 137.)

Procedure

Sections 5, 7, 8 and 11 of the Administrative Procedure Act (5 U. S. C. §§1004, 1006, 1007 and 1010), insofar as directly involved in this proceeding, provide:

"Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo

in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

* * *

"(c) Separation of Functions.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

* * *

"Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

"(a) Presiding Officers.—There shall preside at the taking of evidence (1) the agency, (2) one or

more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case."

* * *

"Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

"(a) Action by subordinates.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1)

in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

"(b) Submittals and decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

* * *

"Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. * * *"

"Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

Approved June 11, 1946."

The rules governing deportation proceedings under 8 U. S. C. §137 appear in the Appendix to the brief submitted herewith.

E.

Reasons for Granting the Writ

1. *The decision of the Court below conflicts with a decision of the Court of Appeals of the Ninth Circuit.* The Court below held that the Administrative Procedure Act did not control the conduct of deportation hearings where the warrant of arrest was served before the effective date of that act.

In *Yanish et al.* v. *Barber*, 181 F. 2d 492, the Court of Appeals for the Ninth Circuit sustained an injunction issued against deportation proceedings conducted not in accordance with the Administrative Procedure Act where the warrants of arrest in that case were served upon Yanish and Diaz as it was upon the petitioner in the instant case in May 1946. The Ninth Circuit Court of Appeals based its decision upon the new rules of the Immigration and Naturalization Service of March 9, 1950, issued after the *Sung* decision. They made no distinction as to procedure, dependent on the effective date of the Administrative Procedure Act or the initiation of proceedings before or after that date.*

2. *The Federal question presented as to whether the Administrative Procedure Act, or at least the separation of functions of hearing officer and examining officer in a deportation proceeding, is necessary to constitute a fair hearing such as is embraced within the conception of due process of law is one of general importance.*

3. *The Court below, in holding otherwise, decided a Federal question in a way probably in conflict with applicable decisions of this Court.*

4. *The Court below, in holding that the substantive constitutional safeguards of the Bill of Rights of the Federal Constitution did not apply to an alien in a deportation case, decided important Federal constitutional questions in a way probably in conflict with applicable decisions of this Court and in violation of the provisions of said Bill of Rights.*

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*Appendix, pp. i-vii. Three forms of the relevant portions of the rules appear in the Appendix: (1) the rules as they existed while the Administrative Procedure Act applied; (2) the rules after the Administrative Procedure Act no longer applied; (3) the old rules prior to the applicability of the Administrative Procedure Act. The old rules appear in the 1949 edition of C. F. R., Title 8. The later rules as yet appear only in the Federal Register.

5. The Court below, in holding that it was not a valid objection that the ground of deportation was an act that occurred before the statute rendering it deportable was adopted, sanctioned a denial of due process and a violation of Section 9 of Article 1 of the Federal Constitution.

6. The Court below, in holding that said substantive constitutional safeguards of the Federal Constitution did not apply to an alien in a deportation case, sanctioned such departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued, out of and under the seal of this Court, directed to the Court of Appeals for the Second Circuit, commanding said court to certify and send to this Court a complete transcript of the record and all proceedings had in said Court of Appeals for the Second Circuit, in the case therein entitled "United States ex rel Peter Harisiades against Edward J. Shaughnessy, District Director of Immigration and Naturalization at the Port of New York"; and that said case may be reviewed and determined by this Court and the decision therein finally reviewed; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem appropriate.

Dated: May 1, 1951.

Respectfully submitted,

PETER HARISIADES,
Petitioner.

By CAROL KING,
Attorney for Petitioner.

ISIDORE ENGLANDER,
Of Counsel.

IN THE

Supreme Court of the United States

October Term—1950

PETER HARISIADES,

Petitioner,

against

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinion of the Court Below

The opinion of the Court of Appeals for the Second Circuit is reported at 187 F. 2d 137. It appears in the record at pages 987-994. The opinions of the District Court are reported in 90 F. Supp. 397 and 431 respectively.

II.

Jurisdiction

1. The statutory provision is 28 U. S. C. §1254.

2. The date of the order for mandate was February 6, 1951 (R. 995).

III.

Abstract of the Case

Petitioner came to this country March 7, 1916[1] as a child of thirteen (Exh. 2, R. 104-5). He entered legally with his father, who subsequently returned to Greece (R. 21). The son took up his fortunes in the new country. He worked first as a "water boy" on the railroads of Illinois because he was "too small." After a year and a half he went to night school (R. 22-3). He became a machinist's helper, then a machinist, and worked for two years as a waiter (R. 123). Later petitioner became a textile worker (R. 23-4), then a loom fixer helper (R. 24). He joined the Workers (Communist) Party about 1925 in Boston (R. 27). That organization changed its name to the Communist Party of the U. S. A. about 1929 while petitioner was a member. Harisiades continued his membership until 1939 when he was dropped because of non-citizenship (R. 28, 46).[2]

During the textile strikes in Massachusetts, Harisiades was working in that State. He was arrested for "strike activities" a number of times in 1928, in New Bedford and

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[1] His name was then Hatzilias (R. 16) or Hadjielias (R. 105). He later "made it" Panagiotis or Pete Hagelias and was known "by a small circle of people" for convenience in unofficial matters as Pete Harrison (R. 13, 16-7). From at least 1943, when first questioned in New York City by the Immigration Service, he has continued to use the name Peter or Panos (R. 47) Harisiades, by which he is now known. "I had some good ideas to Americanize it, but then I Hellenized it again" (R. 18). This he did when he shifted from membership in the English section to membership in the Hellenic-American Brotherhood of the International Workers Order (R. 26).

[2] He became a district organizer, then a section organizer (R. 30) and a member of the Greek Bureau (R. 30) and editor of its Greek paper (R. 31). Still later he became editor of the Greek-American Tribune (R. 101).

Fall River, but these convictions were all reversed by the appellate court (R. 23-4). While under arrest and before this reversal, the Immigration Service took a statement from him (Exh. 6, R. 122-3), in which Harisiades made no effort to conceal the fact that he was a member of the Communist Party. He stated that he was a section organizer, which position he held from 1928 through 1930 (R. 122-3). After that he went to West Virginia, where he was taken into custody in connection with "an unemployed demonstration," but was released without being brought up for trial (R. 24).

After his statement to the Immigration Service, a warrant for his arrest issued April 12, 1930 (Exh. 1[a], R. 120, 126), charging Harisiades with being a member of or affiliated with an organization that teaches or advocates the overthrow of the Government by force or violence. This warrant of arrest was not served until May 2, 1946 (R. 126).

Harisiades settled in New York and Brooklyn in 1933 (R. 25). He married his citizen wife September 15, 1937 (Exh. 7). Of this marriage there have been two children—George, born October 9, 1944, and Irene, born August 5, 1939 (Exhs. 9, 8). The family, wholly supported by Harisiades (R. 50, 193), is living together in Brooklyn (R. 18). "The record contains no adverse information as to his behavior as a husband and father" (R. 853).

According to the Service, the delay in serving the warrant of arrest resulted from their inability to locate the petitioner (R. 16-8). This is, however, hardly credible. During thirteen years Harisiades was living in Greater New York—for six years in the same house and working for the same Greek-American paper which carried his name on the articles he wrote (R. 47). His name on his mar-

[a] The photostatic copy of the warrant of deportation is incorrectly certified as Exh. 1. It was in fact Exh. 49.

riage certificate and on the birth certificates of his two children was the same as on the warrant of arrest (cf. Exhs. 7-9). He registered as an alien in 1940 under the name Harisiades (R. 51) and must have given the other names he had used. He applied for naturalization and gave his names on the petition (R. 19). He was questioned by the Service in 1943 (R. 17). But not until May 2, 1946 did they use the old 1930 warrant to effect his arrest for present membership or affiliation, more than six years after he had been dropped from the organization in question, *i.e.*, the Communist Party. At that time he came in to the office so he could be served. Throughout the extended deportation hearings he was enlarged on his own recognizance (R. 16, 521, 883), indicating no doubt as to his availability. Such treatment would not have been accorded any one whom the Service regarded as having concealed his whereabouts.

In June 1940 when the Act making past membership ground for deportation became law Harisiades had already ceased being a member for more than five months (R. 28).

The original hearings in Harisiades' case were conducted October 15, 1946 and January 30-31, 1947 (R. 13, 53, 84). Gilbert Zimmerman, an inspector of the Immigration and Naturalization Service, acted as judge and prosecutor (presiding inspector and examining inspector). During these hearings he lodged three additional charges predicated upon (1) past personal proscribed beliefs, (2) past membership in an organization holding and advising, advocating or teaching proscribed beliefs, and (3) past affiliation with such organization (R. 48). When the inspector filed his proposed findings after the hearings he found the original charges in the warrant of present membership and application not to have been sustained, but the lodged charges to have been sustained (R. 191-2).

Counsel for Harisiades filed exceptions (R. 194). Instead of deciding the case, the Commissioner ordered the hearings reopened for the purpose of authenticating documents and of lodging two additional charges: (1) One of past membership and affiliation substantially the same as (2) and (3) of the lodged charges; (2) the other of past membership in an organization that writes, circulates, prints, publishes and displays and causes to be written, circulated, printed, published and displayed or has in its possession for such purposes written or printed matter advising, advocating and teaching the overthrow by force and violence of this Government (R. 197).

Thereafter further hearings were conducted. At these reopened hearings in February and March 1948, Zimmerman no longer acted as examining inspector. Maurice A. Roberts was designated as examining inspector and Zimmerman was designated as presiding inspector[8] (R. 205, 345).

At the close of the reopened hearings not only the charges lodged at the original hearing but the additional charges lodged on instructions of departmental superiors were sustained in an opinion by Zimmerman, which takes 277 pages of the printed record (R. 529-805). The views of Zimmerman as presiding Inspector were sustained by the Assistant Commissioner—including Zimmerman's view that the charges in the original warrant were not sustained (R. 852). On May 13, 1949, the Board of Immigration Appeals dismissed the appeal from the decision of the Assistant Commissioner but sustained Harisiades' deportation solely on two grounds: (1) During the period of his membership the Communist Party of the U. S. A. advocated

[8] Only because counsel had been informed that John P. Boyd and Arthur Phelan would act as examining and presiding inspector respectively, and because of objection to them based on their connection with the *Bridges* case and their unfamiliarity with the proceedings, and because of their disqualification under the then rules, was a petition against their functioning filed (R. 198-202).

the overthrow of the Government of the United States by force and violence, and (2) it distributed printed matter which so advocated (R. 873).

The Board of Immigration Appeals expressly stated: "We do not sustain these other grounds of deportation. We find that the evidence of record does not establish that the respondent [petitioner here] personally believed in or advocated the overthrow of the Government of the United States by force or violence" (R. 873).

The warrant of deportation on which Harisiades was arrested May 20, 1949 (R. 4) was the warrant issued after the decision of the Assistant Commissioner. That warrant found all the five charges to have been sustained (Copy appears in the Appendix, pp. xix-xx). The Service did not even take the trouble to issue a new warrant showing the dropping of the three charges not sustained by the Board of Immigration Appeals.

ARGUMENT

I.

The Act of October 16, 1918, as amended June 5, 1920, and as more particularly amended June 28, 1940, could not, consistent with the Federal Constitution, be construed to apply to the petitioner, whose membership in the organization found under that law to be proscribed, *i.e.*, the Communist Party, had terminated months before the 1940 Amendment rendered an alien deportable for past membership in any organization.

(a) The Statute as so Construed and Applied Offends the Bill of Rights.

The court below stated without qualification that an alien's "license to remain is revocable at the sovereign's will; thereafter with respect to deportation he is entitled only to procedural due process" (187 F. 2d at 140). This view would seem to disregard the guaranties of the First and Fifth Amendments.[4]

The order of deportation rests upon a finding that Harisiades "has been" a member of the Communist Party. The Board of Immigration Appeals had found that "the evidence . . . does not establish" that Harisiades "personally believed in or advocated" such doctrine (R. 873). Harisiades testified that he did not understand the Communist Party so to advocate, nor had he ever himself subscribed to such views or himself ever committed or attempted to commit any overt act in the direction of realizing any such views (R. 107, 23-4).

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[4] The Court of Appeals went further than the district court did, for Judge LEIBELL at least recognized the applicability of the substantive guaranties (R. 923-34), but held upon the authority of *Gitlow v. New York*, 268 U. S. 652 and *Dunne v. United States*, 138 F. 2d 137, C. C. A. 8 (1943) that "Section 137 of Title 8, U. S. Code, is constitutional."

Consequently, the order of deportation, upon the record here, necessarily gives the statute the construction that, for an alien, mere one-time membership in the Communist Party, without his having understood it to hold proscribed doctrine, or to have distributed proscribed literature, is ground for deportation. The question is whether this construction and application of the statute deprives Harisiades of the right of freedom of speech and of assembly and of the liberty guaranteed by the First and Fifth Amendments.

"The constitutional infirmity we urge here is that the statute as construed and applied strikes not at advocacy of forbidden doctrine, but at innocent membership in an organization holding such supposed beliefs or distributing literature containing such supposed advocacy. See Mr. Justice BRANDEIS, *Whitney* v. *California*, 274 U. S. 357, 373."

There is a profound tradition in American life to which all notice of guilt by imputation is abhorrent. It holds that responsibility is personal, that no man shall suffer penalty for the deed of another. No decision of the Supreme Court has heretofore sustained the statute here *sub judice* nor attached punishment upon innocent assembly or association.[5] So-called syndicalism laws, when sustained, have turned decisively on the relation fixed in the statute between membership and knowledge of the unlawful doc-

[5] The decision of Chief Justice VINSON in the Taft-Hartley cases (*Communications Assn.* v. *Douds*, 339 U. S. 382), is concerned with the power of Congress to deprive a trade union of the benefits of the National Labor Relations Board if certain of its officers fail to take the non-communist oath provided by Section 9(h). He upholds this provision only because he regards a union official as having "powers comparable to those possessed by a legislative body." He treats the union official as though he were a Government officer and then refuses him privileges if he does not conform to legislative specifications. But throughout the opinion he relies on the fact that the statute, as he claims its legislative history indicates, is directed against a particular kind of conduct, *i.e.*, political strikes, and thus concludes "that the remedy provided by §9(h) bears reasonable relation to the evil which the statute was designed to reach" (pp. 390-1).

trines advocated by the organization. See *Whitney* v. *California, supra; Burns* v. *United States*, 274 U. S. 328, and cf. *Gitlow* v. *New York*, 268 U. S. 652, and *Schenck* v. *United States*, 249 U. S. 47.

By the deportation law of 1918, however, guilt by association alone was introduced for the first time into a federal law. Neither the Sedition Act of 1798 nor the Espionage Acts of 1917 and 1918 had drawn upon such a conception. As Professor Chafee has said: "We got safely through the Civil War and the World War without finding it necessary to create group guilt outside the limits of an actual conspiracy" (*Free Speech in the United States*, 1941, p. 470). Professor Chafee has noted significantly that even the two lawyers charged by the Department of Justice with the enforcement of the Espionage Act during the First World War had publicly condemned statutes penalizing men for mere membership in an organization. Alfred Bettman pronounced such a proposal an "absolutely complete departure from our traditional democratic doctrines," adding, "One of the fundamental conceptions of Anglo-Saxon law is that guilt is personal and not by association." John Lord O'Brian said: "Abandonment of the doctrine of personal guilt" in our deportation statutes presented an "anomaly in our jurisprudence." (*The Menace of Administrative Law*, 25 Reports, Maryland State Bar Assn., 1920, p. 163.) Chief Justice Hughes reminded in 1920, when opposing the expulsion of the Socialist assemblymen in New York: "It is of the essence of the institutions of liberty that it be recognized that guilt is personal" (quoted by the Supreme Court in *Schneiderman* v. *United States*, 320 U. S. 118, 154, note 41).

This Court has in a series of opinions drawn lines relevant to judgment here.

In *DeJonge* v. *Oregon*, 299 U. S. 353, its advocacy, conceded for the purposes of that appeal, of forbidden doctrine

was held not imputable to a meeting called by the Communist Party so that DeJonge's participation in the meeting "* * * consistently with the Federal Constitution * * * cannot be made a crime" (p. 365).

Conviction was reversed in *Herndon* v. *Lowry*, 301 U. S. 242, as a constitutional invasion of the right of free speech. Basic to the reversal of his conviction, predicated upon his holding meetings for recruiting members into the Communist Party and soliciting contributions for it, was the absence of any proof that Herndon "brought the unlawful aims [of the party] to their notice" or "that he approved them" (at p. 260). This result was reached although the persons Herndon recruited "agreed to abide by the tenets of the party" some of which were assumed to be seditious.

In his concurring opinion in *Whitney* v. *California*, 274 U. S. 357, Mr. Justice BRANDEIS, with concurrence of Mr. Justice HOLMES, wrote:

> "The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it." (p. 373)

The meeting in DeJonge's case was not infected with the supposed illegal character of the Party which called it, absent proof of illegal advocacy at the meeting. Herndon's proselytizing of members into a party claimed to be illegal was not made a crime, absent proof that he brought the Party's unlawful aims to their attention. Even Miss Whitney's knowing membership in a party preaching criminal syndicalism was said by Mr. Justice BRANDEIS to be "a right within the protection of the Fourteenth Amendment" (274 U. S. 357, 379). This Court's views,

then, can only mean, in application here, that any relationship between Harisiades and the Communist Party may not be transmitted into legal sin, that Harisiades in assembling with the Party did not exceed the bounds of free assembly marked by the Constitution—unless at least it be proven in addition that he had knowledge of the Party's objectives or doctrines, which the Court found to be forbidden, and himself subscribed to them.

> "* * * where the fate of a human being is at stake the presence of the evil purpose may not be left to conjecture." (*Bridges* v. *Wixon*, 326 U. S. 135, 149)

The law here *sub judice*, like Section 22 of the Internal Security Act of 1950, "does not require an evil intent or purpose on the part of the alien" (96 Cong. Rec. 15675 unbound). As to the latter, Mr. Truman also said in his veto message:

> "There should be no room in our laws for such hysterical provisions. The next logical step would be to 'burn the books.'"

Freedom of speech and assembly are "cognate rights." *Thomas* v. *Collins*, 323 U. S. 516. As freedom of speech must not be stifled by threats overhanging its exercise, so freedom of assembly must not be paralyzed by one's fear of being tied to some hidden ultimate aims of others. A "liberty-loving society" sees in assembly the same "command of the broadest scope" it sees in speech. Cf. *Bridges* v. *California*, 314 U. S. 252, 263.

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(2)

The Supreme Court has never passed upon whether the Communist Party was a proscribed organization under the statute (See *Schneiderman* v. *United States*, 320 U. S. 118, 147-8).

The Second Circuit Court of Appeals in reliance on the documentary evidence introduced and the testimony of witnesses upon which the hearing officer himself placed little credence (R. 796) concluded that upon a collateral review in habeas corpus "it is enough that there was some evidence from which the conclusion of the administrative tribunal could be deduced * * *" (187 F. 2d at 141). Judge SWAN went on to say:

> "Moreover even if the evidence of the proscribed advocacy were deemed insufficient, the alien would now be deportable under section 22 of the Internal Security Act of 1950" by virtue merely of his past membership in the Communist Party.
>
> "P.L. 831, 81st Cong., 2d Sess., C. 1024 (Sept. 23, 1950)."

Thus, the Court below throws into the balance against petitioner a statute not in existence when his hearings were being conducted, the constitutionality of which was seriously questioned in the President's veto message (96 Cong. Rec. 15672 unbound) and which because of its attack on the Communist Party by name appears on its face to be a bill of attainder (*Ex parte Garland*, 4 Wall. 333; *United States* v. *Lovett*, 328 U. S. 303). To bring such a new law to bear on petitioner's case, terminated before its enactment, serves to highlight the unfairness to which he has been subjected. The constitutionality of the Internal Security Act of 1950 should not be thus indirectly injected into a case already involved in many and serious constitutional issues.

We are faced here not with whether the administrative finding, with or without legislative fiat, is so lacking in evidentiary support as to amount to a denial of due process. The administrative finding we are talking about here goes to the jugular of the Bill of Rights.

This Court has in a long series of decisions laid down the "clear and present danger" test: *Schenck* v. *United States*, 249 U. S. 47; *Bridges* v. *California*, 314 U. S. 252, 263; *Prince* v. *Massachusetts*, 321 U. S. 158, 167; *Terminiello* v. *City of Chicago*, 337 U. S. 1, 4.

The Marxist-Leninist literature on which the administrative holding and the decision below relies has already been studied by this Court in the *Schneiderman* case. The Court there said (pp. 157-8):

> "A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open.
>
> "There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason."

While it is true that in the same opinion, this Court also stated that it was not saying that a reasonable man could not possibly have found that the Party in 1927 actively urged the overthrow of the Government by force and violence (p. 153), there is a basic distinction that must be kept in mind in any attempt to relate the passage to this case. The narrow question for decision in the

Schneiderman case was whether advocacy of such doctrine was incompatible with the statutory requirement of attachment to the Constitution at the time the privilege of naturalization was being extended, and not, as here, whether deportation for past membership in the organization, *without more*, transcends the guarantees of the Bill of Rights. This Court by this passage did not mean to say that such advocacy, *without more*, if viewed in the frame of "clear and present danger" or, more largely, in the frame of the Bill of Rights, might reasonably be held outside the area of constitutionally protected speech or assembly. Its drawn line against only "agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil" (at p. 157) and its suggested comparison with *Bridges* v. *California*, 314 U. S. 252, Justice BRANDEIS' concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 372-80, and *Taylor* v. *Mississippi*, 319 U. S. 583 (at pp. 589-90), are striking proof that the Court's previous indication that a reasonable man could possibly have found forbidden advocacy on the basis of the relevant documents alone was far removed from an indication that a reasonable man could possibly have found on the same basis that the "clear and present danger" test had been transcended by membership terminated years before in the Party.

The *Schneiderman* case did hold, however, that such proof as here did not support denaturalization. Is it to be said that virtually the identical proof does support deportation of a man who has been here thirty-five years and has a citizen wife and two native born children? Like denaturalization, deportation is a fate of utmost "gravity," it seeks to undo "new relations and new interests" which flow from prolonged residence in this country, and when, as here, it turns on issues of belief, the proof is no less "treacherous." See *Baumgartner* v. *United States*, 322 U. S. 665, 675.

> "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted." (*Bridges* v. *Wixon*, 326 U. S. 135, 154)

See also: *Wong Yang Sung* v. *McGrath*, 339 U. S. at pp. 50-1.

Thus, this Court has before it serious constitutional questions under the First and Fifth Amendments not hitherto considered by the Immigration Service or the Board of Immigration Appeals when this case was pending before the administrative agency, and decided adversely by the courts below on authorities which do not adequately support those views. The great weight of authorities beginning with the *Schenck* case and ending with the *Dennis* case points to the inevitable conclusion that the statute as here construed and applied violates not alone the First but the Fifth Amendment to the Federal Constitution.

The Fifth Amendment embodies substantive, as well as procedural guarantees,—and these, "to any person." And the First Amendment prohibits "all laws" abridging freedom of speech and of the press or the right of people peaceably to assemble, "not merely some laws or all except" deportation laws or all except laws within the "plenary power" of Congress. See STONE, *C. J.* in *Jones* v. *Opelika*, 316 U. S. 584, 609.

The Bill of Rights is distorted if we see it only as a bill of privileges that are a good for the person who desires to use them. These rights are called "the great, the indispensable democratic freedoms" (*Thomas* v. *Collins*, 323 U. S. 516, 530) for a deeper reason. It is because these freedoms are "indispensable to the effective and intelligent

use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill* v. *Alabama*, 310 U. S. 88, 103. It is because through their free use in a free society "the remedial channels of the democratic process remain open and unobstructed." *Minersville School District* v. *Gobitis*, 310 U. S. 586, 599. It is because the exercise of these freedoms is "so vital to the maintenance of democratic institutions." *Schneider* v. *State*, 308 U. S. 147, 161. It is because "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." HOLMES, *J.*, dissenting, *Abrams* v. *United States*, 250 U. S. 616, 630. "Therein," said Chief Justice HUGHES, "lies the security of the Republic, the very foundation of constitutional government." *DeJonge* v. *Oregon*, 299 U. S. 353, 365.

Surely this foundation for the Bill of Rights does not admit of a distinction between citizen and alien. The quality of an idea "to shape the destiny of modern industrial society" or its possibility of contributing to the "ultimate good" does not turn on whether it springs from alien or citizen.

Although the majority of this Court in *Bridges* v. *Wixon*, 326 U. S. 135, did not pass on the substantive constitutional protections to an alien in deportation proceedings, Mr. Justice DOUGLAS did write:

> "So far as this record shows the literature published by Harry Bridges, the utterances made by him were entitled to that protection." (p. 148)

The entire concurring opinion of Mr. Justice MURPHY stands upon the availability of the Bill of Rights to just such a situation as Harisiades is confronted with here. As, for instance, when the Justice writes:

> "Since resident aliens have constitutional rights, it follows that Congress may not ignore them in the exercise of its 'plenary' power of deportation." (p. 161)

The Court below fails to answer the constitutional argument above outlined by its declaration that an alien's right to remain is "revocable at the sovereign's will." That concept ignores the human suffering involved in taking from an individual "all that makes life worth living" (*Ng Fung Ho* v. *White*, 259 U. S. 276, 284) and from his American family not alone its head but its only means of support (R. 50, 193). Apart, however, from these human values, such a concept disregards legal rights. A revocable license cannot be terminated by requiring that the licensee, petitioner here, forego his constitutional rights. To permit aliens to reside in the United States only if they relinquish the rights guaranteed all "persons" by the First and Fifth Amendments would contravene the decisions of the Supreme Court that unconstitutional conditions may not be imposed.

Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1;
Power Manufacturing Co. v. *Saunders*, 274 U. S. 490;
Terral v. *Burke Construction Co.*, 257 U. S. 529;
Frost v. *Railroad Commission of California*, 271 U. S. 583;
Hanover Fire Insurance Co. v. *Harding*, 272 U. S. 494;
United States v. *Chicago M. & S. P. R. Co.*, 282 U. S. 311, 324;
Western Union Tel. Co. v. *Foster*, 247 U. S. 105, 114.

The contention here made is stated by Reuben Oppenheimer as follows:

> "If a contrary decision were reached, there would be, in substance, no constitutional guaranty of the right of an alien to due process of law in deportation proceedings, for Congress could then validly provide that the making of a claim by an alien to due process would be an independent ground for deportation. On the same reasoning, while it has been held that the property of a friendly alien cannot be taken for public use without just compensation, Congress could lawfully provide that the alien's request for compensation of itself could make him deportable." (The Constitutional Rights of Aliens, 1 Bill of Rights Review, 100, 110-11.)

(b) The Statute as Construed and Applied Here Bears No Reasonable Relation to the Purpose for Which Governmental Power to Deport Exists.

There is a related approach by which it is made equally plain that the statutory application here offends the Constitution. As we have said, the order of deportation upon the record here necessarily gives the statute the construction that for an alien mere one-time membership in the Communist Party "for no matter how short a time or how far in the past so long as it was after the date of entry" (Sen. Rep. No. 1721, p. 3; and Conf. Rept. H. R. 2683, p. 9, 76th Cong., 3d Sess.), without his ever having understood it to hold supposed forbidden doctrine, is ground for deportation.

Presumably, the power of Congress over deportation is exercised so as to eliminate undesirable aliens. But must not this power of Congress, like any other of its admitted powers, be exercised in a manner showing some reasonable and justifiable relation between the statute and the purpose for which the power exists?

The "reasonable relation doctrine" is firmly established in this Court. It has been applied to determining whether (1) a prima facie presumption declared by a statute is justifiable, and (2) whether the conduct prescribed by a statute bears a reasonable relation to the purpose for which the power to legislate exists. *Bailey* v. *Alabama*, 219 U. S. 219, 238, followed in *Taylor* v. *Georgia*, 315 U. S. 25, and *Pollock* v. *Williams*, 322 U. S. 4; *Tot* v. *United States*, 319 U. S. 463—involving presumptions created by statutes; and *Cummings* v. *State of Missouri*, 4 Wall. 277, 319-20; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534-35; and *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 525—involving the application of the rule of reason to substantive statutory provisions.

Surely this elementary restraint applies as well to deportation statutes. Lest any irrelevant fact be selected as the statutory ground for deportation there must be a rational relation between the ground for deportation and the legislative judgment of undesirability.

The Court below found the Government's argument that its right to deport was unlimited by constitutional safeguards "most persuasive" but went on to say:

> "Nevertheless it is unnecessary to rest decision upon the principle that Congress has absolute and unqualified power with respect to the deportation of aliens. Even if the power be not absolutely unlimited and if we assume that a statute would be invalid which directed deportation for some cause having no rational relation to the public welfare, as, for example, that all blue-eyed aliens be deported, this is not such a case. The statute here involved is directed against those who have at any time confederated to overthrow the Government by force, and we hold that its present application is not unconstitutional." (187 F. 2d at p. 141.)

It failed to take into account that the alien might become a member of the Communist Party, as Harisiades did, without understanding its alleged aims to be what the Court found them to be, and might have ceased to be a member many years ago.

The Court below bases itself on petitioner's having "joined the group voluntarily and at a time when membership in such an organization was ground for expelling him from the country"; on his having served as organizer of the Communist Party, and having become Secretary of its Greek Bureau; on his not having voluntarily withdrawn but having been "dropped from membership for reasons of party policy."

But even this Court recognized in the *Schneiderman* case that "for some time the question whether advocacy of governmental overthow by force and violence is a principle of the Communist Party of the United States has perplexed courts, administrators, legislatures, and students." (320 U. S. at 147.)

Harisiades held official positions in the Communist Party. However, he was not found to have believed in force and violence, (R. 873) and testified that he did not understand the Communist Party had any such belief or advocacy (R. 107, cf. R. 7). During his long residence in this country and his active struggles in the political and economic field there is no evidence that Harisiades ever resorted to violence. This man has led a law-abiding life (R. 5). He has been a good husband and a good father (R. 853). The record does not show Harisiades to be undesirable in any way unless this can be predicated upon his voluntary membership in the Communist Party, long since terminated.

The Court subordinates the right of the individual to join any group to "the public interest in a workable rule

which avoids the administrative difficulties of making a separation between those who do and those who do not favor the illegal objective of the group." The same difficulties of separation were presented in the criminal cases, for instance involving Herndon and DeJonge. Due process and constitutional requirements required just such separation to be made. Finally when membership has ceased no problem of a workable rule remains. Quite apart from any question of ex post facto, when membership or affiliation has ceased simplification in the administration of the law cannot justify resort to such arbitrary standards. The principle that past association with organizations not known by the alien to be proscribed should not subject him to penalties is reenforced by Sec. 25 of the Internal Security Act of 1950, amending Sec. 305 of the Nationality Act of 1940 so as to make the following exemption in subd. 6(e) from the 10 year bar to naturalization of applicants who were members of Communist front organizations required by the act to be registered:

> "* * * That the provisions of this section shall not apply to any person who shall be a member of or affiliated with any such Communist-front organization who shall, within three months from the date upon which such organization was so registered or so required to be registered, renounce, withdraw from, and utterly abandon such membership or affiliation, and who thereafter ceases entirely to be affiliated with such organization."

The legislative history of the bill indicates that the Congress, in passing the amendment rendering deportable an alien long resident in this country who at some remote time during that residence became a member of the Communist Party, was not concerned with protecting the Government against destruction.

Mr. Hobbs, at the time he called up the conference report on the bill, told his colleagues that this provision was aimed at deporting Bridges. He said:

> "It is my joy to announce that this bill will do, in a perfectly legal and constitutional manner, what the bill specifically aimed at the deportation of Harry Bridges seeks to accomplish. This bill changes the law so that the Department of Justice should now have little trouble in deporting Harry Bridges * * *." (86 Cong. Rec. 9031.)

He went on to tell the House quite as frankly that the period of past membership and the alien's knowledge of the proscribed character of the organization or of its literature were immaterial:

> "* * * after this bill becomes law, it will be perfectly clear that any alien * * * if at the time of his entry or at any time thereafter he has been, even for 1 minute, a member of such an organization, he shall be deported." (idem, p. 9032)

See Chafee, *Free Speech in the United States* (1941, pp. 445 *et seq.*) quoting among other statements that of Representative T. F. Ford:

> "The mood of the House is such that if you brought in the Ten Commandments today and asked for their repeal and attached to that request an alien law, you could get it."

The Court below, though grudgingly assuming the rule of reasonable relation to be applicable, limited its application to situations such as a law for the deportation of aliens with blue eyes. We submit that if the Constitution permits deportation, in contradistinction to criminal proceedings, to find justification in guilt by association, that justification cannot be extended to guilt by past association, more especially where the alien against whom the

Government is proceeding was not found ever to have held proscribed beliefs, and is necessary to the maintenance and happiness of his citizen family.

(c) The Application of the 1940 Amendment to Harisiades Denied Him Due Process of Law Because It Subjected Him to Punishment Under a Law Having an Ex Post Facto and Retrospective Effect.

Mahler v. *Eby*, 264 U. S. 32, 39, upon which the Court below relied, contains nothing more than dicta to sustain the view Judge SWAN expressed, "Nor is it a valid objection that the ground of deportation is an act that occurred before the statute was adopted" (187 F. 2d at 142). The statute invoked against Mahler did not, however, apply retrospectively, for the decision was that a finding of present undesirability was prerequisite to deportation. That dictum fails, moreover, to recognize that the consequences of deportation are too serious to permit classifying it as merely a civil judgment—a fact more clear under present day conditions. *Bridges* v. *Wixon*, 326 U. S. 135; *Wong Yang Sung* v. *McGrath*, 339 U. S. at 50-1.

As lately as May 1950, the Supreme Court recognized that the essence of the constitutional protection at least in civil cases was against laws retrospective in effect. Chief Justice VINSON, in ruling that Section 9(h) of the Taft-Hartley law was not *ex post facto*, wrote with reference to the familiar cases, *United States* v. *Lovett* (328 U. S. 303), *Ex parte Garland* (4 Wall. 333) and *Cummings* v. *Missouri* (4 Wall. 277):

> "in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and

loyalties will be transformed into *future* conduct (*Communications Assn.* v. *Douds, supra,* at 413)." (Emphasis the Court's.)

These deportation proceedings against Harisiades offend common conceptions of fairness embodied in *ex post facto* and due process. The effect of the 1940 amendment on Harisiades was not merely *ex post facto* but also retrospective—a distinction the importance of which has been indicated by the Supreme Court (*e.g., Bugajewitz* v. *Adams,* 228 U. S. 585). It subjects aliens to deportation for membership in an organization, even though such membership had long since terminated when the amendment was adopted.

The legislative history of the amendment involved in the case at bar shows plainly that it was enacted (1) to get around the ruling in the *Strecker* case, and (2) to make possible the deportation of Harry Bridges. There was no "substantial ground" for any "congressional judgment" that his *past* membership would be "transformed into *future* conduct."

The amendment of the statute in 1940, after his membership had ceased, deprived Harisiades of the immunity from deportation proceedings under the law as it then stood (*Kessler* v. *Strecker,* 307 U. S. 22). Statutory constructions with similar effect have been condemned as *ex post facto* in criminal cases (*Lindsey* v. *Washington,* 301 U. S. 397), as when they constitute a new rule of evidence in aid of conviction (*Kring* v. *Missouri,* 107 U. S. 221); and a violation of due process in civil cases, as when they seek to free a cause of action from the bar of a statute of limitations which has run (*Stewart* v. *Keyes,* 295 U. S. 403).

This question too is one of great importance upon which this Court should pass.

II.

Deportation upon these procedures offends due process of law.

The Court below failed to consider the petitioner's contention that the hearings did not meet constitutional standards of impartiality. As to the contention that the hearings denied petitioner due process of law because they did not conform to the requirements of the Administrative Procedure Act (5 U. S. C. §1001 *et seq.*) the Court below concluded that the act did not apply: (1) because the provisions of the act not complied with, *i.e.*, the qualification of the presiding inspector and the method of appointing examiners, were "procedural requirements"; (2) the deportation proceeding was regarded as initiated either in 1930 when the warrant of arrest issued or on May 2, 1946, when the old warrant charging present membership was served. Accordingly, the Court of Appeals concluded that by its own terms the Administrative Procedure Act was not applicable. It further concluded that the hearing on the amended charges was "initiated" before those charges were lodged, by analogy to Rule 15(c) of the Federal Rules of Civil Procedure that where the claim arose out of the "conduct, transaction, or occurrence" asserted in the original pleading "the amended pleading relates back to the date of the original pleading." But the opinion below fails to recognize that the "conduct, transaction, or occurrence" ceased to exist for a period of time after Harisiades was dropped from membership in the Communist Party. If it was revivified by the enactment of the 1940 law making past membership grounds for deportation, at the very least there was an interval of months when Harisiades was not deportable on any ground. Assuming for the purpose of the present argument, without conceding (*cf.* Point I, *supra*), that on May 26, 1940 a

law could constitutionally be passed making an alien deportable for membership theretofore terminated, such membership was in any event at an end and a later charge based upon it could not bring it back into existence. The interval of non-membership could not be bridged by means of an analogy to the Federal Rules of Civil Procedure. (Cf. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 67.). In fact the "conduct, transaction, or occurrence," *i.e.*, deportable membership in a proscribed organization, had come to an end in 1939, and could not relate back to 1930, the date of the "original pleading," *i.e.*, the warrant of arrest.

The Court below also relied on the fact that non-compliance with the Administrative Procedure Act in the qualifications of the presiding inspector and the method of appointing examiners was of no consequence in that they were "procedural requirements" and consequently were not "mandatory as to any agency proceeding[a] initiated prior to the effective date of such requirement" (Sec. 12, 5 U. S. C. 1011). But the qualification of the judge and the appointment of the prosecutor are substantive, not procedural requirements, if there are any provisions in the statute that are not procedural. It cannot be that all the provisions of the Administrative Procedure Act are procedural, for were we to accept that view, the statutory language excepting procedural requirements would be meaningless, for all procedures would be excepted from the mandatory requirements. The Attorney General, in recommending the enactment of the Administrative Procedure Act, stated with reference to the hearing examiner requirement that "this provision was one of the most important provisions in the Act" (Sen. Doc. 248, 79th Cong. p. 223).

[a] This Court has concluded that the term "proceeding" is "not a technical one" (*Hale* v. *Henkel*, 201 U. S. 43, 66. *Cf. Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346, 349).

In *Wong Yang Sung v. McGrath*, 339 U. S. 33, 41, Justice JACKSON, after noting that only two administrative evils were relevant to the issues, disposed summarily of the evil of lack of uniformity and then went on to say:

> "More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge."

He thereafter collects the criticism of deportation hearings upon this ground.

Finally, the very section which excepts procedural requirements is the same section which provides for the one-year lag in the effective date of the provision for "selection of examiners pursuant to section 11," thus making it doubly plain that this is not a procedural requirement.

We come back, then, to our original contentions:

Hearings Did Not Meet Constitutional Standards of Impartiality

This was recognized by Mr. Justice JACKSON in the *Wong Yang Sung* case, when he said, speaking for this Court, that "When the Constitution requires a hearing, it requires a fair one," and that:

> "It might be difficult to justify as measuring up to a constitutional standard of impartiality a hearing for deportation proceedings the like of which has been condemned by Congress as unfair even when less vital matters of property rights are at stake." (50-1)

The Provisions of the Administrative Procedure Act Were Applicable

(a) *Section 5 to the 1946-7 Hearings*

Petitioner contends that the charges lodged against him at the hearing of October 15, 1946 are new and different charges. At that time Section 5 of the Administrative Procedure Act was plainly in effect. That section provided for separation of functions in subdivision (c) (*supra*, p. 9). However, no such separation had taken place. Zimmerman acted as presiding inspector and examining inspector at the 1946 and 1947 hearings (R. 13, 15, 53, 84, 116).

(b) *Sections 5 and 11 to the Reopened Hearing*

The reopened hearing was an agency proceeding initiated February 18, 1948, the date that hearing started, or certainly no earlier than August 5, 1947, the date on which the Commissioner directed the reopening. Nevertheless, Zimmerman, the inspector appointed under the immigration laws, presided. No hearing examiner under Section 11 of the Administrative Procedure Act had been appointed, although that law insofar as it related to such examiners, went into effect June 11, 1947 (5 U. S. C. §1010).

The Legislative History Sustains This View

The Legislative History of the Administrative Procedure Act (Doc. No. 248, 79th Cong. 2d Sess.) explains that the reason for not making the law applicable to proceedings initiated prior to its effective date was to "afford agencies ample time to prepare and make any adjustments required in their procedures" (p. 216). No such reason existed or could have existed in the case at bar, as there was an ample opportunity to comply with the Act before the hear-

ings were reopened in October of 1947, and the reason for deferment for one year of the selection of examiners under Section 11—"to permit present military service personnel an opportunity to qualify for these positions" (*idem*)—had taken place.

The reason and the only reason why the Service did not comply with the Administrative Procedure Act was because it had concluded that the Act was not applicable to deportation proceedings (*Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36). Failure to comply was not due to lack of time to reorganize but to wilful refusal.

The Ninth Circuit Court of Appeals Decided the Same Question in a Contrary Manner

In *Yanish* v. *Barber*, 181 F. 2d 492, the Government had argued, as it did in the case at bar, that the proceedings had been initiated prior to the effective date of the Administrative Procedure Act. In that case a number of aliens, including Yanish and Diaz, sought an injunction to preclude the Service from conducting deportation hearings against them until it complied with the Administrative Procedure Act. The warrants were served upon Yanish and Diaz, in that case as in this, in May 1946. With the facts clearly brought to the Court's attention by typewritten briefs of counsel for the aliens and counsel for the Government, the Court in a per curiam opinion reversed the decision of the District Court denying the injunction.

Thus, the Ninth Circuit Court of Appeals held the Administrative Procedure Act applicable to a case where the two aliens in question were arrested prior to the passage of the law and the hearings took place after the law became effective. The Court based its decision upon the new rules

of the Immigration and Naturalization Service of March 9, 1950 (15 Fed. Reg. 1298-1302, Appendix, pp. i-vii), which made no distinction on the basis of the "initiation of proceedings" as to the conduct of hearings. The rules covered all hearings in deportation proceedings whether the warrant of arrest was served before or after the effective date of the Act. They made no distinction as to procedure, dependent on the effective date of the Administrative Procedure Act or the initiation of proceedings before or after that date.

The Effect of the Emergency Appropriations Act

To gloss over the denial to petitioner of such a fair hearing as should have been accorded him pursuant to the Administrative Procedure Act, Judge Swan wrote:

> "The issue has now become of little, if any, significance because of the enactment on September 27, 1950 of P. L. 843, 81st Cong. 2d Sess., which provides:
>
> > 'Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8[4] of the Administrative Procedure Act (5 U. S. C. 1004, 1006, 1007).'
>
> "Whether this would make the original hearings lawful, had they not been 'initiated' before September 11, 1946 we need not decide. At the least it seems that any new hearing could be presided over by an officer having no different qualifications than did Inspector Zimmerman." (187 F. 2d at p. 140.)

This statement overlooks two factors: (1) that petitioner was entitled to a hearing conducted in accordance with the procedural requirements controlling at the time his hearings were conducted; (2) that a new hearing on the charges

[4] Section 11 became inoperative if Sections 7 and 8 were done away with.

found to have been sustained would under the present rules require not a one-man but a two-man hearing, i.e., that very separation of functions which Harisiades was denied in his original hearings conducted in October 1946 and January 1947 (8 C. F. R. 151.2[f], Appendix, pp. x-xi).

Furthermore, the courts have not yet passed on the constitutionality of P. L. 843, 81st Cong., 2d Sess., which is extremely doubtful in view of the decision of this Court in the *Sung* case. In any event it cannot be assumed, as was done by the lower Court in the case at bar, and then such reliance placed on that assumption that no consideration is given to whether petitioner was granted such hearing as was consistent with the requirements of due process of law as laid down in Mr. Justice JACKSON's opinion in the *Sung* case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be granted.

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Of Counsel.

[APPENDIX FOLLOWS]

APPENDIX

Rules and Regulations

Under the Administrative Procedure Act

8 C. F. R., §§151.2-151.9 (published Federal Register 1299-1301, March 10, 1950), promulgated to conform to principles enunciated in *Wong Yang Sung* v. *McGrath*, requiring compliance with Administrative Procedure Act.

§151.2 *Conduct of hearing*—(a) *Hearing examiner; general powers.* The officer assigned to conduct the hearing under a warrant of arrest shall be referred to as the "hearing examiner," who shall be an officer appointed pursuant to the provisions of section 11 of the Administrative Procedure Act (60 Stat. 244; 5 U. S. C. 1010). He shall have authority to (1) administer oaths and affirmations, (2) request the issuance of subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) regulate the course of the hearing, (5) take or cause depositions to be taken, (6) dispose of procedural requests, (7) recommend decisions in accordance with §151.5, and (8) take any other action consistent with applicable provisions of law.

(b) *Hearing examiner; general duties.* The hearing examiner shall conduct a fair and impartial hearing. He shall not consult with any person or party on any fact in issue unless upon notice and opportunity for all persons concerned to participate and he shall not perform any duties inconsistent with his duties and responsibilities as a hearing examiner. He shall certify that the record is a verbatim report of everything that is stated during the course of the hearing, including oaths administered, the

warnings given to the alien or the witnesses, and the rulings on objections, except statements made off the record. The hearing examiner shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious. He may, within his discretion, exclude from the record any arguments in support of objections, but, in such event, he shall permit the proponents to submit their arguments in writing to accompany the record.

(c) *Hearing examiner; specific duties.* At the commencement of the hearing under a warrant of arrest, the hearing examiner shall (1) place the alien under oath or affirmation, (2) enter of record a copy of the warrant of arrest and explain to the alien in simple, understandable language the nature of the charges contained therein, (3) advise the alien, if not represented by counsel or other qualified representative, that he may be so represented if he desires and require him to state then and there for the record whether he desires such representation, (4) inform the alien of the definition and penalty for perjury, and (5) warn the alien of disabilities incurred under the act of March 4, 1929, as amended, respecting reentry to the United States after arrest and deportation or departure from the United States pursuant to an order of deportation. The hearing examiner may, at such time during the hearing under the warrant of arrest as he deems appropriate, advise the alien concerning applications for the privilege of departure in lieu of deportation or for suspension of deportation under the provisions of section 19(c) of the Immigration Act of 1917, as amended, in all cases except (1) those in which the alien is charged with being subject to deportation upon one of the grounds mentioned in section 19(d) of the said act, and (2) those in which the alien was admitted to the United States as a non-immigrant visitor under section 201 of the United States Information

and Education Exchange Act of 1948 (62 Stat. 7; 2 U. S. C. 1446; Public Law 402, 80th Cong.). If, as provided in paragraph (e) of this section, additional charges are lodged, the hearing examiner shall immediately explain these charges to the alien and shall advise him, if he is not represented by counsel or other qualified representative, that he may be so represented if he desires, and require him to state then and there for the record whether he desires such representation. The hearing examiner shall also inform the alien that he may have a reasonable period of time within which to meet the lodged charges if the alien so desires. The hearing examiner shall take such part in the hearing, including interrogation of the alien and witnesses, as is necessary, to assure a fair and impartial hearing.

(d) *Withdrawal and substitution of hearing examiners.* No person shall serve as hearing examiner in any case, if prior thereto, he engaged in the performance of investigative or other enforcement functions in the same case. The hearing examiner assigned to conduct the hearing in any case may at any time withdraw if he deems himself disqualified; and, upon the filing, by the alien or his attorney or representative or by the examining officer, in good faith, of a timely and sufficient affidavit of personal bias or disqualification of any such officer, that issue shall be determined by the Commissioner as a part of the record and decision in the case. If a hearing examiner becomes unavailable to complete his duties within a reasonable time in connection with any case, another hearing examiner shall be assigned to complete the case. In such event the new hearing examiner shall first familiarize himself with the case and shall enter of record a statement in writing that he has done so.

(e) *Examining officer; general duties.* The officer assigned to represent the Government at the hearing shall be referred to as the "examining officer." He shall (1) interrogate the alien and present such witnesses and documentary evidence as he may deem necessary, (2) conduct cross examination of the alien's witnesses, if any; and (3) enter such objections as he may deem appropriate to the evidence presented by or on behalf of the alien. If, during the hearing, it develops that there exist grounds in addition to those stated in the warrant of arrest, why the alien is subject to deportation, the examining officer shall, with the permission of the hearing examiner, lodge additional charges against the alien and shall offer evidence upon such charges in like manner as on charges contained in the warrant of arrest.

(f) *Examining officer; specific duties.* The examining officer shall interrogate the alien to develop evidence concerning (1) alienage, (2) date, place, and manner of entry into the United States, (3) grounds for deportation, (4) factors bearing on statutory eligibility for discretionary relief, and (5) such other information as may be pertinent to the issues of the case. If the alien is suffering from any mental or serious physical disability, the examining officer shall obtain and present for the record a medical certificate showing whether such alien is in condition to be deported without danger to life or health and whether he will require special care and attention in the event of deportation overseas. In cases in which the alien is charged with being deportable by reason of conviction for crime in the United States or abroad, the examining officer, so far as practicable, shall offer in evidence a duly authenticated copy of the record of conviction and sentence and, if it is deemed necessary in order to establish whether the crime involves moral turpitude, a duly authenticated copy of the informa-

tion, indictment, or complaint upon which the alien was convicted.

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§151.3 *Contents of record; evidence*—(a) *Record.* The transcript of testimony and exhibits, together with all written motions and other papers and requests filed in the proceeding, shall constitute the exclusive record for the recommended decision of the hearing examiner.

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§151.4 *Proposals and arguments upon conclusion of hearing.* The examining officer and the alien or his counsel or representative may within five days following the conclusion of the hearing submit to the hearing examiner proposed findings of fact and conclusions of law and a statement of supporting reasons. They may, if they so desire, state orally for the record immediately at the conclusion of the hearing that they waive that right or they may file a written waiver of the said right within five days following the conclusion of the hearing.

§151.5 *Recommended decision*—(a) *Preparation by hearing examiner of written recommended decision.* Except as provided in paragraph (d) of this section, the hearing examiner shall, as soon as practicable after the conclusion of the hearing and with due regard to the provisions of §151.4, prepare in writing his recommended decision, signed by him, which shall set forth a summary of the evidence adduced, a ruling upon each of the matters which may be submitted pursuant to §151.4, and his proposed findings of fact and conclusions of law as to deportability. If the alien has applied for the privilege of departure in lieu of deportation or for suspension of deportation, the recommended decision shall also contain a separate summary, ruling, proposed findings and conclusions as to the

alien's statutory eligibility under the provisions of section 19 (c) of the Immigration Act of 1917, as amended, for such relief. The decision shall be concluded with a statement of the hearing examiner's recommended order which shall be either (1) that the alien be deported, or (2) that the warrant of arrest be canceled, or (3) that the alien be found to have established statutory eligibility for specific relief from deportation.

(b) *Service of written recommended decision.* The original written recommended decision shall be made part of the record of the case. The hearing examiner shall cause signed copies of such decision to be served either in person or by registered mail on the alien or his counsel or representative as well as on the examining officer.

(c) *Exceptions to written recommended decision.* The examining officer and the alien or his counsel or representative shall be allowed a reasonable time not to exceed ten days (which may be extended only upon a showing of good cause that more time is necessary), except that the ten-day period shall be reduced to five days in the case of aliens detained by the Service, in which to submit to the officer in charge of the district or suboffice (1) proposed findings and conclusions, or (2) exceptions to the recommended decision, and (3) supporting reasons for such exceptions or proposed findings or conclusions for consideration by the Commissioner. Any person upon whom service of the written recommended decision has been made may file a written waiver of the right specified above.

* * *

§151.6 *Reopening of hearing by hearing examiner.* At any time prior to the forwarding of the record of hearing to the Commissioner, the hearing examiner may at his own instance direct that the case be reopened for proper cause.

He may direct a reopening upon request of the examining officer or of the alien or his counsel. Such requests shall be in writing, shall state the new facts to be proved, and shall be supported by affidavits or other evidentiary material. Requests for reopening shall be filed with the officer in charge of the district or suboffice who shall refer them to the hearing examiner.

* * *

§151.9 *Decision by the Commissioner*—(b) *Reopening.* The Commissioner may for proper cause direct a reopening of any case which is before him for consideration. Hearings ordered reopened by the Commissioner shall be conducted by a hearing examiner, who need not be the hearing examiner originally presiding in the case.

* * *

After the Administrative Procedure Act

8 C. F. R. §§151.2-151.9 (published Federal Register, 7637-9, November 10, 1950), promulgated as a result of the Supplemental Appropriations Act, 1951, approved September 27, 1950 (Public Law 843, 81st Cong., 2d Sess.), providing that thereafter proceedings under the laws regulating exclusion or expulsion of aliens need not comply with §§5, 7 and 8 of the Administrative Procedure Act.

§151.2 *Conduct of hearing*—(a) *Hearing officer; general powers.* The officer assigned to conduct the hearing under a warrant of arrest shall be referred to as the "hearing officer." He shall have authority to (1) administer oaths and affirmations, (2) issue, during the course of the hearing, any subpenas authorized by law, (3) conduct the hearing and rule upon all objections to the introduction of evidence or motions made during the course of the

hearing, (4) take or cause depositions to be taken, (5) make decisions in accordance with §151.5, (6) grant voluntary departure or preexamination pursuant to §150.3 of this chapter, or both, and (7) take any other action consistent with applicable provisions of law and regulation.

(b) *Hearing officer; general duties.* The hearing officer shall conduct a fair and impartial hearing. He shall use his independent judgment in rendering his decision and shall not perform any duties inconsistent with the duties and responsibilities of an adjudicating officer, except as provided in this part. He shall certify that to the best of his knowledge and belief the record is a true report of everything that was stated during the course of the hearing, including oaths administered and the rulings on objections, except statements made off the record. The hearing officer shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious. He may, within his discretion, exclude from the record any arguments in support of objections, but, in such event, the alien or his counsel or representative may submit argument in the form of a brief to accompany the record.

(c) *Hearing officer; specific duties.* At the commencement of the hearing under the warrant of arrest, the hearing officer shall (1) place the alien under oath or affirmation, (2) enter of record a copy of the warrant of arrest and explain to the alien in simple, understandable language the nature of the charges contained therein, and (3) advise the alien, if not represented by counsel or other qualified representative, that he may be so represented if he desires and require him to state then and there for the record whether he desires such representation. Except as provided in paragraph (f) of this section, the hearing officer shall thereafter present all available evidence, including the interrogation of the alien and all witnesses presented,

concerning (1) alienage, (2) date, place and manner of entry into the United States, (3) grounds for deportation, (4) factors bearing upon statutory eligibility for discretionary relief, and (5) such other information as may be pertinent to the issue of the case: *Provided,* That the alien need not be interrogated in any case in which the facts as to such matters are stipulated pursuant to §151.3(d). The hearing officer shall, at such time during the hearing under the warrant of arrest as he deems appropriate, advise the alien concerning application for the privilege of departure in lieu of deportation or for suspension of deportation under the provisions of section 19(c) of the Immigration Act of 1917, as amended, in all cases except (1) those in which the alien is charged with being subject to deportation upon one of the grounds mentioned in section 19(d) of the said act and (2) those in which the alien was admitted to the United States as a nonimmigrant visitor under section 201 of the United States Information and Education Exchange Act of 1948 (62 Stat. 7; 22 U. S. C. 1446; Pub. Law 402, 80th Cong.).

(d) *Hearing officer; additional charges.* If, during the hearing, it develops that there exist grounds in addition to those stated in the warrant of arrest why the alien is subject to deportation, the hearing officer may lodge additional charges against the alien and shall develop evidence upon such charges in like manner as on the charges contained in the warrant of arrest. When additional charges are lodged against the alien, the hearing officer shall explain these charges to the alien in simple, understandable language and shall advise him, if he is not represented by counsel or other qualified representative, that he may be so represented if he desires, and require the alien to state then and there for the record whether he desires such representation. The hearing officer shall also inform the

alien that he may have a reasonable period of time within which to meet the additional charges if the alien so desires and require the alien to state then and there whether he desires such additional time.

(e) *Withdrawal and substitution of hearing officer.* No person shall serve as a hearing officer in any case if he has engaged in the performance of investigative or other enforcement functions in the same case. The hearing officer assigned to conduct the hearing in any case may at any time withdraw if he deems himself disqualified. If a hearing officer becomes unavailable to complete his duties within a reasonable time in connection with any case, another hearing officer shall be assigned to complete the case. In such event the new hearing officer shall first familiarize himself with the case and shall state for the record that he has done so.

(f) *Assignment of examining officer in addition to hearing officer; duties of examining officer.* An officer other than a hearing officer shall be assigned by the officer in charge of the district in which the hearing is to be held to act at the hearing as the "examining officer" in any case in which the warrant of arrest contains a charge, or an additional charge is lodged during the course of the hearing, that the alien is subject to deportation under (1) the act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, Public Law 831, 81st Congress; 8 U. S. C. 137); (2) the act of February 9, 1909, as amended (35 Stat. 614, 42 Stat. 596; 21 U. S. C. 171, 174-175); (3) the act of February 18, 1931, as amended (46 Stat. 1171, 54 Stat. 673; 8 U. S. C. 156a); or (4) so much of section 19 of the Immigration Act of 1917, as amended (39 Stat. 889-890; 54 Stat. 671-673; 56 Stat. 1044; 8 U. S. C. 155) as relates to criminals, prostitutes, procurers or other immoral persons, anarchists, subversives and mental de-

fectives; or in any other case, in the discretion of the officer in charge of the district. The examining officer shall in such cases conduct the interrogation of the alien and of the witnesses on behalf of the Government and the examination or cross examination of the alien's witnesses, present all available evidence bearing upon the alien's liability to deportation, lodge such additional charges as he may find to be applicable, and, if the alien has applied for relief from deportation, inquire thoroughly into the alien's statutory eligibility for such relief. The hearing officer in such cases shall exercise all his regular functions not herein assigned to the examining officer, and he may, in addition, take such part in the interrogation of the alien and witnesses as he may deem necessary to assure that a full and proper hearing is held.

* * *

§151.3 *Contents of record: evidence*—(a) *Record.* The transcript of testimony and exhibits, together with all written motions and other papers and requests filed in the proceeding, shall constitute the record for the decision in the case.

* * *

§151.4 *Proposals and arguments upon conclusion of hearing,* is revoked.

§151.5 *Decision*—(a) *Preparation by hearing officer of written decision.* Except as provided in paragraph (d) of this section, the hearing officer shall, as soon as practicable after the conclusion of the hearing, prepare in writing a decision, signed by him, which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability. If the alien has applied for relief from deportation, the decision shall also contain a separate determination as to whether or not the

hearing officer is satisfied, on the basis of the evidence presented, as to the alien's statutory eligibility for the relief requested. The decision shall be concluded with a statement of the hearing officer's disposition of the case which shall be (1) that the alien be deported, or (2) that the warrant of arrest be cancelled, or (3) that the alien be found to have established statutory eligibility for suspension of deportation, or (4) that the alien be granted voluntary departure at his own expense in lieu of deportation, or (5) that the alien be granted voluntary departure at his own expense in lieu of deportation with the additional privilege of preexamination, or (6) that such other action be taken in the proceedings as may be required for the appropriate determination of the same. The hearing officer shall have no authority to exercise the Attorney General's powers under section 19(c) (2) of the Immigration Act of February 5, 1917, as amended, or under the 7th proviso to section 3 of that act.

(b) *Notice of decision.* The decision shall be made part of the record of the case. The hearing officer shall cause a signed copy of such decision to be served either in person or by registered mail on the alien or his counsel or representative, together with a notice advising him of his right to file exceptions as provided in paragraph (c) of this section.

(c) *Exceptions to written decision.* The alien or his counsel or representative shall be allowed five business days (which period may be extended by the hearing officer upon a showing of good cause that more time is necessary) in which to submit to the officer in charge of the district or suboffice, for consideration by the Commissioner, exceptions to the hearing officer's decision, which may be accompanied by supporting argument or brief. The alien or his counsel or representative may enter a written waiver of

the right herein specified to file exceptions to the decision of the hearing officer.

* * * *

§151.6 *Reopening of hearing*—(a) *Execution.* At any time prior to the forwarding of the record of hearing to the Commissioner, the hearing officer may at his own instance direct that the case be reopened for proper cause, or he may direct a reopening upon request of the alien or his counsel or representative. Such request shall be in writing, shall state the new facts to be proved, and shall be supported by affidavits or other evidentiary material. A request for reopening shall be filed with the officer in charge of the district or suboffice who shall refer it to the hearing officer.

(b) *Denial.* The denial of an alien's motion to reopen any case in which the decision of the hearing officer has become final as provided in §151.5(e) shall be in writing, and a copy thereof shall be served on the alien or his counsel or representative. Upon the denial of such a motion the entire record, including the motion papers and the order denying the motion, shall be forwarded promptly to the Commissioner for review and the Commissioner may enter any order in the case which he deems appropriate.

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§151.9 *Decision by the Commissioner*—(b) *Reopening.* The Commissioner may for proper cause direct a reopening of any case which is before him for consideration. Hearings ordered reopened by the Commissioner shall be conducted by a hearing officer, who need not be the hearing officer originally presiding in the case.

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Before the Administrative Procedure Act

8 C. F. R., §§150.6-150.8 (1944 ed. C. F. R., Title 8, pp. 109-112), prior to the Supreme Court's decision in the *Sung* case holding the Administrative Procedure Act applicable to the Immigration and Naturalization Service.

§150.6 *Hearing*—(a) *When to be accorded under warrant.* After the alien has been taken into custody under a warrant of arrest and has been given a reasonable time to arrange for his defense, including, if desired, representation by counsel, and after the formal warrant of arrest has been received, if arrest was accomplished under a telegraphic warrant, the alien shall be granted a hearing to determine whether he is subject to deportation on the charges stated in the warrant of arrest. A hearing under a telegraphic warrant of arrest, and prior to the receipt of the formal warrant of arrest, shall be held only on the request of the alien or his counsel, or when, in the discretion of the officer in charge, it is deemed impracticable to await the receipt of the formal warrant. The alien shall be informed of his right to request a hearing upon a telegraphic warrant prior to the receipt of the formal warrant.

(b) *Presiding inspector to be other than investigating officer.* The immigrant inspector assigned to conduct a hearing under a warrant of arrest shall be referred to as the "presiding inspector." The immigrant inspector who conducted the investigation in the case shall not act as presiding inspector unless the alien consents thereto. The presiding inspector shall rule upon all objections to the introduction of evidence or motions made during the course of the hearing. In cases to which no examining inspector

has been assigned pursuant to the provisions of paragraph (n) of this section, the presiding inspector shall conduct the interrogation of the alien and the witnesses in behalf of the Government and shall cross-examine the alien's witnesses and present such evidence as is necessary to support the charges in the warrant of arrest. The presiding inspector shall see that all documentary or written evidence is properly identified and introduced into the record as exhibits by number, unless read into the record. He shall further make sure that, subject to the provisions of paragraphs (d), (e) and (g) of this section, the record is a verbatim report of everything that is stated during the course of the hearing, including the oaths administered, the warnings given to the alien or the witnesses, and the rulings on objections, except statements made off the record with the consent of the alien or his counsel.

(c) *Procedure; notice of charges; right to apply for discretionary relief.* At the beginning of a hearing under a warrant of arrest, the presiding inspector shall (1) permit the alien to inspect the warrant of arrest and inform him of the charges contained therein by repeating them verbatim and explaining them in language which will clearly convey to the alien the nature of the charges he must answer; (2) apprise the alien, if not represented by counsel, that he may be so represented if he desires and require him to state then and there for the record whether he desires counsel; (3) place the alien under oath or affirmation; (4) advise the alien of the penalty for perjury; and (5) enter of record as an exhibit, identified by number, a copy of the formal warrant of arrest, or a decoded copy of the telegraphic warrant if hearing is held thereunder. The presiding inspector shall in all cases further advise the alien of the provisions of paragraph (g) of this section concerning applications for the privilege of suspension of

deportation, departure in lieu of deportation, and departure in lieu of deportation in conjunction with preexamination. Such advice shall in no way preclude a subsequent finding that the alien is ineligible for any one or all of the forms of relief for which he may have applied. A continuance of the hearing for the purpose of obtaining counsel shall not be granted more than once, unless sufficient cause for the granting of more time is shown.

* * *

(l) *Additional charges.* If, during the hearing, it shall appear to the presiding inspector that there exists a reason additional to those stated in the warrant of arrest why the alien is subject to deportation, he shall notify the alien that such additional charge is lodged against him, and shall proceed with the hearing upon such charge in like manner as on charges contained in a warrant of arrest.

* * *

(n) *Assignment of examining inspector in addition to presiding inspector; duties of inspectors.* The officer in charge of the district in which the hearing is to be held may, in his discretion, assign a second immigrant inspector to act at the hearing as the "examining inspector." The examining inspector shall conduct the actual interrogation of the alien and of the witnesses in behalf of the Government and the examination or cross examination of the alien's witnesses, present such evidence as is necessary to support the charges in the warrant of arrest, lodge such additional charges as he may find to be applicable in the manner hereinbefore directed, and, if the alien has applied for the privilege of departure in lieu of deportation or for suspension of deportation as provided in §150.6(g), §150.8(b) or §150.10, inquire thoroughly into the alien's eligibility for such relief. The presiding inspector in such cases, shall exercise all functions not herein assigned to

the examining inspector, and he may, in addition, take such part in the interrogation of the alien and witnesses as he may deem necessary to assure that a proper hearing is accorded to the alien. [12 F. R. 5114, as amended at 13 F. R. 263]

§150.7 *Proposed findings, conclusions, and order*—(a) *Preparation by presiding inspector.* As soon as practicable after the hearing has been concluded, the presiding inspector shall prepare a memorandum setting forth a summary of the evidence adduced at the hearing, his proposed findings of fact and conclusions of law, and a proposed order.

* * *

(c) *Proposed order.* In the proposed order the presiding inspector shall recommend cancellation of the proceedings, deportation, departure under order of deportation, departure in lieu of deportation, or suspension of deportation in accordance with the judgment he has made on the basis of the evidence adduced at the hearing.

(d) *Service of findings of presiding officer.* A copy of the presiding inspector's memorandum containing his discussion of the evidence, proposed findings of fact, proposed conclusions of law and proposed order shall be furnished to the alien or his counsel in all instances by personal service, if practicable, otherwise by registered mail, and a return receipt therefor shall be obtained. A copy also shall be furnished to the examining inspector, if an examining inspector has been assigned to the case.

(e) *Filing of exceptions.* (1) The alien or his counsel or representative shall be allowed by the officer in charge a reasonable time (not to exceed 10 days except on showing of good cause that more time is necessary) in which to file

exceptions to the proposed findings, conclusions, and order of the presiding inspector and to submit a brief, if desired. Reasonable extensions of time for the filing of exceptions or brief may be granted in the discretion of the officer in charge. The examining inspector shall promptly file exceptions to the proposed findings, conclusions, and order of the presiding inspector, or state in writing that he waives the filing of exceptions.

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§150.8 *Reopening the hearing.* At any time prior to the forwarding of the record of hearing to the Commissioner, the officer in charge of a district or sub-office may direct that a case be reopened for proper cause. The Commissioner may direct a reopening of the record of hearing for proper cause at any time prior to such time as an appeal from his order may be entered in accordance with the provisions of §90.3(a) of this chapter. Requests by aliens or their representatives for a reopening of a hearing prior to entry of a final order shall be in writing, state the new facts to be proved, and be supported by affidavits or other evidentiary material. All requests for reopening must be filed with the appropriate field office of the Immigration and Naturalization Service. If the record of hearing has been forwarded to the Commissioner from that office, the request for reopening shall be forwarded to the Commissioner. The Commissioner shall grant or deny the request if the case is pending before him. If the case is pending before the Board of Immigration Appeals, the request shall be forwarded to the Board. The Board shall consider the request and either remand the case for further hearing or deny the request and render a decision on the record.

Warrant—Deportation of Alien

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
Washington

99183/146 (2271-422209)

No. A-5300756

To District Director of Immigration and Naturalization, New York, New York:

Or to any Officer or Employee of the United States Immigration and Naturalization Service.

WHEREAS, after due hearing before an authorized immigrant inspector, and upon the basis thereof, an order has been duly made that the alien, PETER HARISIADES or PANAGIOTIS HATEILIAS or PETE HAGELIAS or PETE HARRISON or PANAGIOTIS HARJEKLIAS, who entered the United States at New York, New York, ex SS. "Vasilefs Constantinos" on the 7th day of Mar., 1916, is subject to deportation under the following provisions of the laws of the United States to wit: The Act of October 16, 1918, as amended, the respondent is subject to deportation, in that after entry, he was a member of the following class set forth in Section 1 of said Act: An alien who is affiliated with an organization, that believes in, advises, advocates, and teaches the overthrow of the Government of the United States by force and violence; the Act of October 16, 1918, as amended, the respondent is subject to deportation in that after entry, he was a member of the following class set forth in section 1 of said Act: An alien who is a member of and affiliated with an organization, that advises, advocates, and teaches the overthrow of the Government of the United States by force and violence; the Act of October 16, 1918, as amended,

the respondent is subject to deportation in that after entry, he was a member of the following class set forth in section 1 of said Act: An alien who is a member of and affiliated with an organization, that circulates and distributes, and causes to be circulated and distributed, written and printed matter advising, advocating, and teaching the overthrow of the Government of the United States by force and violence; the Act of October 16, 1918, as amended, the respondent is subject to deportation, in that after entry, he was a member of the following class set forth in Section 1 of said Act: An alien who believes in the overthrow of the Government of the United States by force and violence; and the Act of October 16, 1918, as amended, the respondent is subject to deportation, in that after entry, he was a member of the following class set forth in Section 1 of said Act: An alien who is a member of an organization, that believes in advises, advocates, and teaches the overthrow of the Government of the United States by force and violence.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, do hereby command you to deport the said alien to Greece, at the expenses of the appropriation, "Salaries and Expenses, Immigration and Naturalization Service, 1949", including the expenses of an attendant.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 16th day of December, 1948.

A. R. MACKEY,
Acting Assistant Commissioner,
Enforcement Division.